KUMPULAN LIZIZ SDN BHD

v.

PEMBINAAN OCK SDN BHD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL AZIZ RAHIM JC
[SUIT NO: K22-289-2001]
18 JULY 2003

CIVIL PROCEDURE: *Summary judgment - Principles and procedure - Entering judgement on part of claim - Combined effect of O. 14 r. 1 & r. 3 Rules of the High Court 1980*

CONTRACT: *Building contract - Set off - Entitlement set off - Must show evidence of circumstances or facts*

CONTRACT: *Building contract - Retention sum - Whether sum deducted proportionately in interim certificate*

CONTRACT: *Building contract - Performance guarantee - Failure to provide performance guarantee - Waiver of performance guarantee - Act of employer*

CONTRACT: *Building contract - Construction of terms of contract - Conditions of contract - Non-signing of formal contract - Whether there is uncertainty*

NEGOTIABLE INSTRUMENTS: *Cheque - Dishonour of cheque - Whether amounts to fraud*

By a letter of award dated 24 August 2000, the defendant appointed the plaintiff as the contractor for a construction project. In the letter, it was stated that until a formal contract was signed, the letter constituted a legal and binding contract between the parties. The plaintiff proceeded with work despite no formal contract being signed. The plaintiff later presented three interim certificates issued by the architect to the defendant for payment. The defendant failed to make payment. The plaintiff then commenced legal proceeding against the defendant.

On 8 January 2002, the plaintiff filed a summons-in-chambers under O. 14 Rules of the High Court 1980 ("RHC"). The plaintiff argued that it was the obligation of the defendant to pay on the interim certificate without delay upon its presentation and within the period specified in the contract, unless the defendant could bring itself within the permissible bounds of setting off. In its

defence, the defendant claimed that it withheld payment towards the certificates because the plaintiff failed to furnish the performance guarantee. The cheque issued by the plaintiff for the performance guarantee was dishonoured. The defendant claimed it was a fraud. Further, the defendant contended that it was entitled to set off pursuant to cl. 2(1) and 30(3) of the conditions of contract. Clause 2(1) dealt with the cost of appointing other contractors to replace the builders and cl. 30(3) dealt with retention sum. The defendant also argued that there was uncertainty as to the terms of the contract since the plaintiff failed to sign a formal contract.

The learned SAR dismissed the application and hence this appeal.

Held:

[1] There was no merit in the defendant's argument as to cl. 30(3) because the amount had already been deducted from the sum certified by the architect in the interim certificate on a proportionate basis of 5% of the amount due under the certificate.

[2] There was already a provision in the contract that allowed the employer to retain a certain percentage of the sum due under an architect's interim certificate to provide for the retention. Thus it could not be the subject of a set off, unless the contrary was stated or provided for in the conditions of the contract. Further, there was nothing in defendant's affidavit that showed that the defendant was entitled to set off.

[3] To be entitled to a set off, the defendant must show evidence of circumstances or facts that the set off claimed was allowable under the terms of the conditions of contract between the parties.

[4] As for the cost of appointing a new contractor, it was imperative for the defendant to quantify the cost before the defendant could be allowed to claim set off on the item.

[5] In cases where a claim is made on the sum due in interim certificates which have been approved by the employer's architect, and applying the principle in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd*, the defendant must show, in order to deny the plaintiff the summary judgement it seeks, first that there are some defects in the issuance of the interim certificates. If there is no defect, then the defendant must show that he is entitled to set off in accordance with the principles in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd*.

[6] The signing of the condition of contract was only a formality. The non-signing of it by the parties did not in any way affect the contractual relationship between the parties as envisaged in the letter of award. There was a binding contract between the parties and that relationship was regulated, in addition to the additional terms in the letter of award, by the terms of condition of contract as understood by the parties. The subsequent conduct of the parties bore this out.

[7] The fact that the defendant allowed the plaintiff to commence work despite the latter's failure to furnish the performance guarantee amounted to a waiver.

Obiter:

[1] The mere fact that a cheque issued by the plaintiff to the defendant in satisfaction of an obligation already agreed between the parties was dishonoured, and nothing more, was not a fraud.

[2] The combined effect of O. 14 r. 1 and r. 3 is that the court may order a summary judgement to be entered in respect of a part of a claim to which the defendant has no defence having regard to the nature of the remedy or relief claimed.

[Appeal allowed with costs.]

Case(s) referred to:

Alloy Automative Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***

Bandaraya Development Bhd v. Woon Hoe Kan & Sons Sdn Bhd [1972] 1 MLJ 375 ***(refd)***

Bank Negara Malaysia v. Mohd Ismail [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(foll)***

Dawnays Ltd v. FC Minter Ltd [1971] 2 All ER 1389 ***(foll)***

DMCD Museum Associates Sendirian v. Shademaker (M) Sdn Bhd [1999] 1 CLJ 399 ***(foll)***

Malaysian Assurance Alliance Bhd v. Yeam Sai Ming & Ors [1996] 5 MLJ 345 HC ***(foll)***

Mondel v. Steel [1841] 8 M & W 853 ***(refd)***

Ng Hee Thong v. Public Bank Bhd [1995] 1 MLJ 281 ***(foll)***

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC ***(refd)***

Prism Leisure Sdn Bhd v. Lumut Marine Resort Bhd [2000] 5 CLJ 391 HC ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 14 rr. 1, 3, O. 20 r. 3

For the plaintiff - Kong Hong Ming; M/s Lee & Kong
For the defendant - Nicholas Steven Fernandez; M/s Fernandez & Co

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Aziz Rahim JC:
This is an appeal by the plaintiff against the decision of the learned senior assistant registrar ('the SAR') is dismissing the plaintiff application for summary judgment under O. 14 r. 1 of the RHC 1980.

The plaintiff is a limited company incorporated in Malaysia and having its principal office at Ipoh Perak. The defendant is a limited company incorporated in Malaysia with a registered office at Petaling Jaya and having a principal office at Kota Kinabalu.

By a letter of award dated 24 August 2000 issued by the defendant to the plaintiff and accepted by the plaintiff on 13 September 2000 the defendant appointed the plaintiff and the plaintiff accepted the appointment as the contractor to carry out a construction project known as "Proposed Tanjong Aru and Sembulan Renewal Scheme Phase II – Stage 3: 4-storey condominium development block A, B, C and D (also known as Grace Garden) at Sembulan, Kota Kinabalu at the agreed sum of RM28 million.

The letter of award clearly provides that the plaintiff (appellant in this appeal) is the contractor and the defendant (respondent in this appeal) is the employer. The letter of award also makes very clear that the offer and acceptance of the contract was made subject to the Conditions of Contract, Drawings, Specifications as in the tender exercise of 28 December 1999 between the parties and which the plaintiff is deemed to have taken notice of, and in addition the letter of award also contained additional terms and conditions stipulated therein. Under items 28 and 30 of the letter of award, it read as follows:

> 28. Notwithstanding clause 23 of the Condition of Contract, if an Event should occur that the Employer owes the contractor 2 consecutive payment certificates which are due, the Contractor shall be entitled to notify the Architect of such Event. If this Event shall continue for a further seven (7) days from the date of such notification, the Contractor shall be entitled to issue a Stop-Work Notice to the Architect whereupon the Contractor is entitled to stop work without any claims, damages, penalties by the Employer if the said Event still continues after seven (7) days from the Stop-Work Notice.

30. Until a formal Contract is signed, this letter of award shall constitute a legal and binding Contract between us.

A formal contract was never signed by the parties, although the defendant did remind the plaintiff a number of times. In any case, the plaintiff proceeded with the works under the contract. Pursuant to the terms of the agreement between the parties, the Architect for the project, who was appointed by the defendant, measured and valued the works done by the plaintiff and issued three (3) interim certificates, amounting to a total of RM592,854.64 as follows:

1. Interim certificate no. l dated 17 November 2000 for RM163,507.91
2. Interim certificate no. 2 dated 23 December 2000 for RM23,408.67
3. Interim certificate no. 3 dated 21 April 2001 for RM405,938.06

(see para. 8 of Liew Ah Kau's affidavit affirmed on 8 January 2002 in support of the summons-in-chambers at encl. 12 and these certificates were exhibited as exhs. SL4A, SL4B and SL4C respectively)

Pursuant to cl. 30(1) of the Conditions of Contract the plaintiff presented the above interim certificate to the defendant for payment. Clause 30(1) of the Conditions of Contract read as follows:

30(1). At the Period of Interim Certificate named in the appendix to these Conditions the Architect shall issue a certificate stating the amount due to the Contractor from the employer, and the Contractor shall, on presenting any such certificate to the Employer, be entitled to payment thereof within the Period of Honouring Certificates named in the appendix to these Conditions. Interim valuations shall be made whenever the Architect considers them necessary for the purpose of ascertaining the amount to be stated as due in an Interim Certificate.

The appendix to the Conditions of the Contract states that the period of honouring the interim certificate is 30 days from the date of presentation of the certificate. The defendant did not make any payment on any of the Interim Certificate within the stipulated period of honouring the interim certificate and thereafter in spite of several reminders from the plaintiff.

Consequently the plaintiff, on 9 October 2001 took out a writ of summons against the defendant and in its statement of claim that accompanied the writ claimed against the defendant the total sum of RM592,854.64 under the three interim certificates as special damages with interests at 8% per annum from 21 May 2001 to the date of full payment; RM4,200,000 as general damages or alternatively general damages to be assessed; statutory interests at 8% on general damages from the date of judgment to the date of full payment and

cost. The plaintiff on 13 December 2001 amended its statement of claim pursuant to O. 20 r. 3 RHC 1980 adding wrongful repudiation of the contract by the defendant as additional and alternative ground of claim.

On 8 January 2002 the plaintiff filed a summons-in-chambers for summary judgment in respect of the sum RM592,854.64 under the three interim certificates under O. 14 r. 1 of RHC 1980. The plaintiff also claimed interests and costs. The summons-in-chambers was supported by an affidavit of one Liew Ah Kau ("Liews affidavit"), who was then the director of the plaintiff's company. Liew's affidavit was affirmed on 8 January 2002. In paras. 5 and 6 of Liew's affidavit the plaintiff said that the plaintiff had accepted the contract offered by the defendant through the letter of award dated 24 August 2000 and that he had been advised by the plaintiff's solicitors, and he himself believed, that contract was subject to the Conditions of Contract made in the standard form of a building contract PAM/ISM 1969 as modified. The letter of award was exhibited as exh. SL2 in Liew's affidavit.

Both parties also relied on the Supreme Court decision in *Pembenaan Leow Tuck Chui & Sons Sdn. Bhd. v. Dr. Leela's Medical Centre Sdn. Bhd.* [1995] 2 CLJ 345 in which it was held that an employer under the PAM/ISM 1969 Form cannot refuse to pay on an interim certificate issued by the architect except for permissible contractual deduction expressly provided. It was also ruled in that case that the right of set off or counterclaim can be raised in an answer to interim certificate and that there is no special rule of construction in a building contract was which negatives the ordinary common law right of set off (see *Mondel v. Steel* [1841] 8 M & W 853; [1835-42] All ER Rep. 511). But the Supreme Court also said that in that regard it depends in each case on the particular wordings of the contract.

In *Pembenaan Leow*'s case *(supra)* the court was dealing with construction contract similar in form as in the present case; and in *Pembenaan Leow*'s case *(supra)* the Supreme Court identified seven(7) provisions in the contract which allows the employer the right of set off. These seven allowable provisions are:

Clause 30(3)	–	which deals with retention sum.
Clause 2(1)	–	which deals with the cost of appointing other contractors to replace the builder when the builder does not comply with the instruction of the architect and to deduct the cost incurred thereby from money due or to become due to the contractor under the contract.

Clause 19(3)	–	which deals with the amendment paid for insurance premium for insurance against injuries if the builder defaults.
Clause 20(A)	–	which deals with the amount paid for fire insurance if the builder defaults.
Clause 22	–	which deals with total fines for delay as certified by the architect.
Clause 25(3)	–	which deals with the total amount paid to suppliers or subcontractors for goods and material supplied.
Clause 27(a)(iii)	–	which deals with total payments to nominated subcontractors.

The above clauses are also similar as those found in conditions of Contract in Standard form of PAM/ISM 1969 applicable in this case.

Still on the point of right to set off, the court in *Pembenaan Leow*'s case also said:

> In our view therefore the express enumeration of permitted set offs in a contract or subcontract can imply that a defendant builder or main contractor, as the case may be, is limited to making such deductions from the amounts claim as fall strictly within the scope of the permitted set offs and nothing else, on the basis of expression unis principles.

The plaintiff also cited *Pembenaan Leow*'s case as authority for the proposition that it is the obligation of the employer in a building contract to pay on the interim certificate without due delay upon its presentation and within the period specified in the contract, unless the employer can bring itself within the permissible bound of set offs as stated above.

The defendant opposed the plaintiff's application for summary judgment. The grounds of the opposition were contained in two affidavits in opposition by one Tan Jac Dao filed by the defendant. The first affidavit was affirmed on 28 January 2002 and was filed on the same date (Tan's first affidavit). The second affidavit in opposition, which was intituled 'Further Affidavit in Opposition' was affirmed on 29 May 2002 and was filed on the same day (Tan's second affidavit).

In para. 5 of Tan's first affidavit the defendant admitted that by the letter of award "SL2" the defendant had appointed the plaintiff as contractor to construct the said project and to complete the same within 24 months. The defendant also admitted in para. 5(a) of Tan's first affidavit that the said letter of award set the scope of works and performance to be undertaken by the plaintiff. Tan, in his first affidavit, also deposed that the plaintiff had failed to furnish the Performance Guarantee of RM3 million as required under cl. 23 of the letter of award despite several reminders by the defendant as evidenced by a letter dated 12 December 2000 exhibited as TJD1 in Tan's first affidavit. Therefore the defendant claimed that the plaintiff had breach the term of the agreement in particular cl. 23 of the letter of award as to the performance guarantee. Tan also said, in para. 5(f)(g) of his first affidavit the plaintiff cheque dated 10 April 2001 (exh. TJD2(C) in Tan's first affidavit) purportedly for the payment of the performance guarantee was dishonoured and returned by the drawee bank endorsed with 'Payment Stopped'. And in para. 5(h) of Tan's first affidavit, it is very obvious that the defendant withheld payment towards the architect certificates because the plaintiff failed to furnish the performance guarantee. I reproduce below para. 5(h) of Tan's first affidavit:

> (h) without admitting to the accuracy and conclusiveness of the architect certificates exhibited and marked "SL4A", "SL4B" and "SL4C", I say payments towards these architects certificates were withheld by the defendant against the performance guarantee. I had repeatedly represented to the plaintiff that the defendant would make payment towards and in satisfaction of these architect certificates upon receipts the performance guarantee. On 27th April, 2001, the defendant write to the plaintiff that they would withhold payments until the performance guarantee was paid. A copy of the defendants letter to the plaintiff dated 27.4.2001 is produced before me and marked as Exhibit "TJD4".

In para. 6 of his first affidavit Tan deposed that the contract was rightfully rescinded by the defendant on 23 May 2001 because of wrongful breach by the plaintiff. Tan further averred in paras. 6(b) and (c) of his first affidavit that the plaintiff had without reasonable cause suspended it contract works at the site of Block D since January 2001 and subsequently also at the site of Block C and B and that these stoppage of works were never approved by the defendant or the architect and therefore there were unauthorised stoppage of work. Tan went on to deposed in his first affidavit that despite several calls to the plaintiff by the defendant and the architect for the plaintiff to resume works, the plaintiff had failed to do so. (see exh. 'TJD5' and 'TJD6' in Tan's first affidavit).

In para. 7 of Tan's first affidavit, Tan also alleged that the plaintiff Notice of Termination of contract as in exh. 'SL5' of Leow's affidavit was deliberately back dated by the plaintiff to 20 May 2001 and at para. 6(g) Tan denied that the plaintiff had rightfully terminated the agreement and deposed that it was baseless, misleading and untrue. Paragraph 6(f) of Tan's first affidavit stated that the defendant had on 23 May 2001 determined the agreement as exhibited in exh. TJD8.

Therefore Tan said in paras. 13 and 14 of his first affidavit that the plaintiff had caused delay in the completion of the said project by wrongfully suspending all contract works without reasonable cause and thereby given rise to loss, extra cost and expenses to the defendant and had caused damages to the defendant representation. In the premises, the defendant argued that these issues warrant a full trial before payment can be made on the architect certificates.

The plaintiff's application for summary judgment under O. 14 r. 1 came up for hearing on 18 July 2002 before the learned senior assistant registrar who, after hearing counsels from both parties, dismissed the application. Hence this appeal by the plaintiff.

The learned senior assistant registrar had not given any reason for his decision and nor did he write any written grounds to justify the dismissal of the plaintiff's application. Therefore when the appeal came up for hearing before me on 18 June 2003, both counsels agreed that I should re-hear the application afresh.

At the hearing before me both counsels submitted written submissions and also they indicated to me that they would also rely on their written submissions submitted earlier before the learned senior assistant registrar.

The law applicable to O. 14 r. 1 applications is well settled. The defendant in opposing such application need not show the he has good defence to the plaintiff's claim or that his defence to the claim would likely to succeed if he goes to full trial. The defendant need only to show that there is a triable issue as to the matter of fact or any real difficulty as to matter of law. In *Malaysian Assurance Alliance Bhd. v. Yeam Sai Ming & Ors* [1996] 5 MLJ 345, Rekhraj JC said in judgment at p. 353 as follows:

> On an O. 14 application, all that the defendant needs to show is that there is a triable issue to a matter of fact or any real difficulty as to the matter of law (*Crawford v. Gilmore* LR IR 238); and if and when there was a point of law, once it is understood and the court being satisfied that it was really unarguable, would give judgment; see *European Asian Bank AG v. Punjab and Sind Bank* [1983] 2 All ER 508 at p. 516 where it was held:

> ... this court will not hesitate, in an appropriate case, to decide questions of law under O. 14, even if the question of law, at first blush, appears to be of some complexity and takes a little longer time to understand.
>
> To refuse to decide a case which raises a clear cut issue may offend the whole purpose of O. 14, especially when full arguments have been addressed at the court, and the only result of not deciding it will be that the case will go to trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal (see *Verakk v. Great Yarmouth BC* [1980] 1 All ER 839 at pp. 845-846, per Lord Denning MR and Roskill LJ).

In the case of *Alloy Automative Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 CLJ 2; ([1986] CLJ (Rep) 45) the Supreme Court then did caution that the summary jurisdiction conferred by the Rules must be used with great care. Even though the court in that case was dealing with summary application under O. 81 of the RHC 1980, the court did observe that the procedure for the summary application under O. 14 is similar. So it can be deduced that the same principles will apply. At p. 19 (p. 57) of the report, Justice Lee Hun Hoe CJ for Sabah & Sarawak, in delivering the judgment of the court says:

> A defendant ought not to be shut out from defending unless it is very clear he has no case in the action. A complete defence need not be shown. The defence set up need only to show that there is a triable issue or question or that for some reason there ought to be a trial.

Bearing in mind the above principles, the evidence as deposed by Tan in his two affidavits as highlighted above and the fact that the plaintiff is claiming payment only in respect of the three interim certificates issued and verified by the architect appointed by the defendant/employer, I will now proceed to examine whether the grounds raised by the defendant in opposing the application raise any triable issue.

The first ground raised by the defendant is that the defendant is entitled to set off the whole sum under the three interim certificates by virtue of cl. 2(1) and cl. 30(3) of the conditions of contract. Clause 2(1) deals with the cost of appointing other contractors to replace the builders and cl. 30(3) deals with the total retention sum.

The defendant argued that these two items come within the permissible set off decided by the *Pembenaan Leow*'s case based on the principle of *expressio unis.* But the plaintiff argued that the defendant's appointed architect had already made provisions for the retention sum in respect of each of the interim certificate and that the defendant had not been able to quantify the cost of appointing a replacement contractor to justify the set off under cl. 2(1). In my

view there is no merit in the defendant argument as to cl. 30(3) because the amount had already been deducted from the sum certified by the architect in the interim certificate on a proportionate basis of 5% of the amount due under the certificate. Retention sum is deducted for value of work already and actually done and for material already and actually supplied as certified in the architect certificate. It is common under a building contract the retention sum is provided and retained as percentage of the amount due under architect certificate as certified by the employer's architect. The purpose is to make provision for making good any defects in the work, if any, during the liability period. This sum is actually held in trust for the contractor. It will be utilised to pay for any repair of defective works by the contractors. If it not utilised, the accumulated sum will eventually be released to the contractor at the end of the liability period under the contract. Therefore in my view if there is already a provision in the contract that allow the employer to retain a certain percentage of the sum due under an architect interim certificate to provide for thus retention, then it cannot be the subject of set off, unless the contrary is stated or provided for in the conditions of contract.

Further more under cl. 30(1) of the conditions the contract of defendant must honour the certificates within the period stipulated, which in this case is 30 days from the date of presentation of the certificates as provided in the appendix to the conditions of contract. I also find that there is nothing in Tan's affidavit that shows that the defendant is entitled to set off. To be entitled a set off defendant must show evidence of circumstances or facts that the set off claimed for is allowable under the terms of the conditions of contract between the parties. These evidence must be in the affidavit; if there is none, then the court is minded not to consider it. (see *Ng Hee Thong v. Public Bank Bhd* [1995] 1 MLJ 281 and *DMCD Museum Associates Sendirian v. Shademaker (M) Sdn. Bhd.* [1999] 1 CLJ 399). As to the cost of appointing new contractor I am of the opinion that it is imperative for the defendant to quantify the cost before the defendant can be allowed to claim set off on this item. There is nothing in Tan's first and second affidavits that shows the costs or amount that the defendant had incurred in engaging a new contractor or the works that had been carried out by the new contractor to result in the defendant incurring such cost. In the absence of the quantified sum it would not be possible to allow the set off on this item. To be entitled to this set off it is incumbent upon the defendant to show, by way of affidavit and evidence, that the new contractor appointed by the defendant had carried out the works and the extent of the works that had been carried out. It is not sufficient to state in the affidavit, as in this case, that the defendant had appointed a new contractor to continue the works abandoned by the plaintiff. The defendant must quantify the works done and the cost it has incurred for such works. Then and only then, the set

off on this item may be considered. I find support for this proposition in the passages in the case of *Bank Negara Malaysia v. Mohd. Ismail* [1992] 1 CLJ 627; [1992] 1 CLJ 14 and the judgment of the Supreme Court in *Pembenaan Leow Tuck Chui & Sons Sdn. Bhd. v Dr. Leela's Medical Centre Sdn. Bhd.* [1995] 2 CLJ 345.

In *Bank Negara Malaysia* case above, Mohamed Azmi SCJ said:

> In our view, basic to the application of all those legal propositions, is the requirement under Order 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issued but also that the issue is triable. The determination of whether an issue is or is not triable must necessarily depend as the facts or the law arising from each case as disclosed in the affidavit evidence before court.

And in *Pembenaan Leow*'s case above, court said, though only an orbiter at p. 365:

> When, upon proper construction of a particular contract which, of course, is a question of law, there is no obligation on the part of the employer, ... to pay upon being served with a progress payment certificate, because of pending disputes allegation of defects in works or materials or claim for damages for delay, without giving some reasonable amount of details and quantification, are unlikely to result in the dismissal of an application for summary judgment under O. 14 and leave to defend by given (see *Kilby Rhayford Ltd v. Selin Court Ltd* [1973] 229 E91343 (A).

This position is also well supported by an English case of *Dawnays Ltd v. FC Minter Ltd* [1971] 2 All ER 1389 cited with approval in *Pembenaan Leow*'s case.

The second ground raised by the defendant is that there is uncertainty as to the terms of the contract and the actual intention of the plaintiff because of the plaintiff's refusal to sign and execute a formal Condition of Contract despite repeated reminders from the defendant. In Tan's second affidavit, he (ie, Tan) averred that the plaintiff had refused to sign the said conditions of contract even after the defendant requested the plaintiff to do so in a letter dated 26 January 2001; (see exh. 'FA2' in Tan's second affidavit). I find no merit in this argument. The letter of award "SL2" was very clear as to what terms and conditions the contract will be subject to. The letter of award did stipulate that the additional terms are subject Conditions of Contract given to plaintiff at the time of tender and which is deemed to be accepted by the plaintiff. Further more the letter of award also provides that until a formal contract is signed, the letter of award which is to be read as indicated above as the binding contract between the parties. Therefore in my view, the signing of the

condition of the contract is only a formality. The non signing of it by the parties does not in any way affects the contractual relationship between the parties as envisaged in the letter of award dated 24 August 2000. In Tan's affidavits, the defendant did not advance any evidence to show that the contractual relationship created by the letter of award given by the defendant to the plaintiff and accepted by the plaintiff on 13 September 2000 was not binding on the parties. Tan's affidavits only deposed to the fact that no formal contract document was signed by the parties. But it is a trite law that in the absence of a formal document of contract, the nature of the contractual relationship between the parties may be ascertained through the correspondences between the parties and their conducts to see the parties intention to be bound by a contract. In this instant case, the letter of award by the defendant to the plaintiff was very clear as to its binding effect. In fact the letter of award clearly made it subject to the conditions of the contract as in the tender and also contained additional clauses to regulate the relationship between the parties. The plaintiff accepted the terms and conditions in the letter of award unreservedly. Therefore I have no doubt in my mind that there is a binding contract between the parties, and that relationship was regulated, in addition to the additional terms in the letter of award, by the terms of condition of contract as understood by parties. The subsequent conduct of the parties bore this out (see *Prism Leisure Sdn. Bhd. v. Lumut Marine Resort Bhd* [2000] 5 CLJ 391).

The third ground is the failure on the part of the plaintiff to deposit the performance guarantee as required under cl. 23 of the letter of award, to which the plaintiff replied that the defendant has waived the requirement. But the defendant denied the waiver. The defendant went a step further by suggesting that there was fraud on the part of the plaintiff, as regard the performance guarantee when the plaintiff cheque was dishonoured. However from the facts of the case, it is to be noted that in relation to the non deposit of performance guarantee and the fact that plaintiff cheque was dishonoured, the defendant did not exercise its right to terminate the contract; if the requirement (ie, the deposit of the performance guarantee) is so fundamental then the defendant should have acted upon it expeditiously. But not in this case. Instead the defendant allowed the plaintiff to proceed with the works. In *DMCD Museum Associates Sdn. Bhd. v. Shademaker (M) Sdn. Bhd.* [1999] 1 CLJ 399, similar situation occurred where the plaintiff made repeated requests to the defendant to deposit the performance bond; but the defendant failed to do so. Instead the plaintiff allowed the defendant to proceed with the work. At p. 408 of the report his Lordship RK Nathan J said:

> As for non-depositing of the performance bond I hold that the said requirement has been waived by the plaintiff because what the plaintiff ought to have done was to insist on the depositing of the said performance bond before allowing the defendant to commence work on the site. At least the plaintiff ought not to have given possession of the site to the defendant. In any event it is my judgment that the depositing of the performance bond is no longer a condition precedent to entitlement for payments under the said three interim certificates because it has never been denied that the plaintiff had never prevented the defendant from proceeding with the contractual works despite the fact that the said performance bond had not been deposited.

So I find that this is not a good ground for set off and in fact it amount to a waiver.

As to the allegation of fraud, I think there is no merit to it. This issue was raised in the defendant submission in respect of the dishonoured cheque given by the plaintiff purportedly towards the payment of the performance guarantee. In my view this is not enough to sustain the allegation of fraud. In Tan's affidavit there is no other evidence shown beside that the cheque was dishonoured. There is no particulars given as to the design by the plaintiff to defraud the defendant. Since the burden to prove fraud is heavy on the defendant, it is imperative that the defendant in his affidavit gives detailed particulars of the alleged fraud. The mere fact that a cheque issued by the plaintiff to the defendant in satisfaction of an obligation already agreed between the parties was dishonoured and nothing more is not a fraud. The defendant in this case can always sue the plaintiff on the dishonoured cheque. For a fraud to be alleged there must be some indication by way of affidavit evidence of a criminal deception. I find none in this case.

As to stoppage of work, it is a fact that there was stoppage of work. But here again the question is whether the stoppage of work a possible set off under the term of the conditions of contract to deny the plaintiff a judgment in respect of the sum due under the three interim certificates. I do not think so. Learned counsel for the defendant submitted that this case is distinguishable from *Pembenaan Leow*'s case in that in *Pembenaan Leow*'s case there is no issue as to unauthorised stoppage of work by the plaintiff or the failure/refusal to comply with the instruction of the Project Architect to resume work. But in the present case there is such issue. Learned counsel for the defendant further submitted that the unauthorised stoppage of work resulted in a delay of about 130 days for Block D, 43 days for Block C and 123 days for Block B. Learned counsel for defendant submitted that the plaintiff was informed about this by letter as in exh. TJD5 in Tan's first affidavit. It was submitted that because of plaintiff refusal to resume works, defendant had to terminate the contract. In Tan's second affidavit, at para. 10, Tan also said that because of the

termination of the contract by the defendant, the defendant had to engage another contractor by the name of Vanalex Construction Sdn. Bhd. (546696A) to carry out the construction works abandone by the plaintiff. But Tan also said that the defendant could not at the moment quantify the extra cost until the whole project was completed.

I notice that the stoppage of work was on 28 April 2001 as stated in TJD5, a letter dated 30 April 2001 by the defendant's architect. This was after the third interim certificate dated 14 April 2001 was issued by defendant architect. The two earlier certificates by the architect were dated 17.11.2000 and 23 December 2000 respectively. Under the terms and conditions of the contract the employer, that is the defendant, were obliged to pay on the certificates within 30 days of their presentation. This was definitely not done at least as regards to the first two certificates, by the defendant. Therefore in my view there is no correlation between the amount claimed by the plaintiff in the interim certificates and the stoppage of work to entitle the defendant to a set off.

In my view, in cases where a claim is made on the sum due in interim certificates which had been approved by the employer's architect and in applying the principle in *Pembenaan Leow*'s case, the defendant must show, in order to deny the plaintiff the summary judgment it sought, first that there are some defects in the issuance of the interim certificate either as to accuracy of the sum stated therein or whether its issuance is not in accordance with the terms of the contract or that there is fundamental error or fraud attributed to it. If there is no defects with the certificates and the defendant did not challenge it validity or accuracy, then the defendant must show that he is entitled to set off in accordance with the principles in *Pembenaan Leow* case, if the defendant cannot show any of these, in my judgment the court ought to order the payment on the certificates. Incidentally at para. 3 of the defendant's learned counsel written submission dated 8 January 2003, at p. 3, it was submitted as follows:

> However, the defendants wish to point out to this Honourable Court that the defendant's grounds for retaining and set off of the progress payment is not based on grounds of in accuracy of the interim certificates issued by the Architect.

This is a clear admission by the defendant as to its liability to pay on the interim certificates. Therefore the plaintiff ought to be entitled to be paid forthwith on the interim certificate. To deny the plaintiff their money on the interim certificate for some dubious arguments, the facts of which yet to be proved, such as likely loss to be suffered due to stoppage of work or risk due to non deposit of performance guarantee would defeat the very purpose of the interim certificate. The Federal Court in *Bandaraya Development Bhd. v. Woon Hoe Kan & Sons Sdn. Bhd.* [1972] 1 MLJ 375 said, at p. 68:

> ... the purpose of interim certificates was to see that payments made under them were without any correlative right to set off or the very purpose of interim certification to provide cash for the contractor or subcontractor to get on with the work. A debt due under an interim certificate was a debt of a class which ought not to be allowed to be made the subject of a set off or counterclaim.

There is one other point I need to address in this appeal. That is whether I could grant O. 14 r. 1 summary judgment for part of a claim which is based on the interim certificates when the plaintiff in his statement of claim also claimed *inter alia* for damages for wrongful termination of contract, a claim which is obviously need to be proved at full trial. At the end of the submissions on O. 14 r. 1 for summary judgment, I directed the parties to make further submission on this point and both learned counsels obliged by putting in further written submission. Having considered the submissions and the authorities on this point, I am satisfied that the combined effect of O. 14 r. 1 and r. 3 is that the court may order a summary judgment to be entered in respect of a part of claim to which the defendant has no defence having regard to the nature of the remedy or relief claimed. In this instance case, the plaintiff claimed payment on three interim certificates, which some leading authorities cited above has categorised is as a debt of a class, and to which for the reason I stated above, the defendant has no valid defence.

Therefore in the circumstances, I allow the appeal with cost and plaintiff be allowed to enter summary judgment in respect of prayer (1) and (3) of the amended statement of claim, and may proceed with the action in respect of the remainder of the claim.